

HOUSE RESOLUTION No. 488—GEORGE L. LILLEY.

JANUARY 20, 1909.—Ordered to be printed.

Mr. JENKINS, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. Res. No. 500.]

On the 16th day of January the Committee on the Judiciary received from the House of Representatives the following resolution:

Whereas George L. Lilley, a citizen of the State of Connecticut, was duly elected and qualified a Member of the House of Representatives, Sixtieth Congress, from said State; and

Whereas the said George L. Lilley was thereafter, in November, nineteen hundred and eight, elected, and on January sixth, nineteen hundred and nine, duly qualified and entered upon his duties as governor of the said State: Therefore be it

Resolved, That his name be stricken from the roll and his seat in this House be, and is hereby, declared vacant.

By the direction of the House the resolution was referred to the committee for report within ten days.

Immediately upon the adoption of the resolution by the House the committee communicated with George L. Lilley, inclosing to him a copy of the resolution and informing him that he might communicate with the committee in writing or appear in person or by attorney.

In reply thereto the following letter from George L. Lilley, inclosing a copy of a letter of Governor Woodruff, was received January 19, 1909.

STATE OF CONNECTICUT, EXECUTIVE DEPARTMENT,
Hartford, January 18, 1909.

MY DEAR SIR: I have the honor to acknowledge receipt of your favor of January 15, with inclosed copy of resolution introduced by John W. Gaines.

Replying to your letter, I beg to say that on December 11, 1908, I tendered my resignation as Congressman to Governor Rollin S. Woodruff. The matter was referred by Governor Woodruff to the attorney-general, whose opinion it was that the statute was mandatory, and that if the resignation was accepted a special election to fill the vacancy must be held. It seemed to the governor and to the attorney-general that the large expense entailed was a conclusive reason why my resignation should not be accepted. The governor, therefore, declined to accept my resignation.

I felt that the precedent laid down by my predecessor was obligatory upon me as governor, particularly in view of the fact that after deducting the time necessary for a special election there would be but about one month for a new Member to serve. I inclose a copy of Governor Woodruff's letter. My belief is that the people of Connecticut uphold Governor Woodruff's decision.

With sincere regards, I am, very truly, yours,

GEO. L. LILLEY.

Hon. JOHN J. JENKINS,
House of Representatives, Washington, D. C.

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DECEMBER 21, 1908.

MY DEAR CONGRESSMAN: I am in receipt of your letter of December 21, tendering your resignation as Representative at large from the State of Connecticut in the Sixtieth Congress, to take effect January 5, 1909.

Since receiving your resignation I have given the matter much consideration. The day after I received it I asked Attorney-General Holcomb if there is any precedent in this State for such act as I then believed would be, and still believe is, proper for the governor to take in a situation such as this. My idea was then, and still is, that I ought not, in full justice to the State, to accept your resignation. If I do not accept it there is no vacancy in the office of Representative at large, and it is not necessary to hold a special election. If I should accept the resignation it would be necessary under the terms of the act to hold a special election that would require an expenditure of a number of thousands of dollars for a term only sixty days in length, and I do not think that any citizen of the State who has its best interests at heart would consider such an expenditure of money to fill an office for that length of time justifiable.

During the interval between receipt of your letter and this writing I have discussed this matter with several of the State's leading men, and in the main they take the same view that I do, viz, that it is inexpedient to accept the resignation, thereby creating a vacancy and the imperative necessity of holding a special election at large expense to the State and for a very short term of office.

I therefore find it necessary to decline to accept your resignation.

Very truly yours,

ROLLIN S. WOODRUFF.

Hon. GEORGE L. LILLEY,
Congressman at Large, Hartford, Conn.

The following letters were received from officers of the House in answer to request from the committee for information:

HOUSE OF REPRESENTATIVES, CLERK'S OFFICE,
Washington, D. C., January 16, 1909.

MY DEAR SIR: In reply to your favor of January 16, inquiring as to when the Hon. George L. Lilley, Member of Congress from Connecticut, drew anything from my department, would say that on December 22, 1908, he drew check for his stationery in full; and on the 1st day of January, 1909, he drew his clerk-hire check in full for the month of December.

Very truly yours,

A. McDOWELL,
Clerk House of Representatives.

Hon. JOHN J. JENKINS,
Chairman of Committee on Judiciary, House of Representatives.

HOUSE OF REPRESENTATIVES,
OFFICE SERGEANT-AT-ARMS,
Washington, D. C., January 16, 1909.

MY DEAR SIR: I am in receipt of your communication of January 16, making inquiry as to the payment of salary to Representative George L. Lilley, of the State of Connecticut, and also as to whether he has drawn his mileage for the second session of the Sixtieth Congress.

In reply I beg to advise you that Representative Lilley has drawn his salary as a Member of the House of Representatives up to and including the 4th day of December, 1908, and that on the 4th day of January, 1909, one month's salary was credited up to him, which has not been drawn.

On the 22d day of December, 1908, Mr. Lilley made application, by letter, for a remittance of the mileage due him for the second session of the Sixtieth Congress. In answer to this communication he was advised by this office that mileage was payable only when the Member had attended a session of the House, conforming to the law which provides that this mileage shall be paid for attendance upon each session of Congress. There is therefore at this time to Mr. Lilley's credit his mileage and accrued salary from the 4th day of December, 1908.

Very respectfully,

HENRY CASSON,
Sergeant-at-Arms, House of Representatives.

Hon. JOHN J. JENKINS,
*Chairman Committee on the Judiciary,
House of Representatives, Washington, D. C.*

The committee find as facts that George L. Lilley was elected a Member of this House from the State of Connecticut to the Sixtieth Congress.

That the name of George L. Lilley was placed on the roll of Members-elect of the Sixtieth Congress.

That George L. Lilley performed more or less duties as a Member of this House during the first session of the Sixtieth Congress.

That George L. Lilley has not been in attendance at any time during the second session of the Sixtieth Congress.

That on the 11th day of December, 1908, George L. Lilley tendered his resignation as Member of this House to Rollin S. Woodruff, governor of the State of Connecticut, to take effect January 5, 1909, and that Governor Woodruff declined to accept the resignation.

That George L. Lilley did not withdraw his resignation as a Member of this House.

That George L. Lilley was elected governor of the State of Connecticut and took the oath of office as governor of that State on January 6, 1909; and that ever since he took the oath of office he has been performing the duties of the office of governor of the State of Connecticut and has remained at the executive office at Hartford, Conn.

That on December 22, 1908, he drew his check for his stationery in full.

That on the 1st day of January, 1909, he drew his clerk hire in full for the month of December.

That George L. Lilley drew his salary as a Member of the House of Representatives up to and including the 4th day of December, 1908.

That on the 22d day of December, 1908, George L. Lilley made application by letter for a remittance of the mileage for the second session of the Sixtieth Congress.

What effect did the tendering by George L. Lilley of his resignation as Member of this House to the governor of the State of Connecticut have upon the membership of George L. Lilley in the Sixtieth Congress; and if his membership did not cease on the 5th day of January, 1909, what effect did the qualification of George L. Lilley as governor of the State of Connecticut have upon the membership of George L. Lilley in the Sixtieth Congress.

The Constitution is silent as to how a Member can dissever his membership. The Constitution anticipates that a vacancy may occur:

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies. (Clause 4, sec. 2, art. 1.)

The Constitution does not prohibit a Member from holding any state office.

The Constitution does provide—

That no person holding any office under the United States shall be a member of either House during his continuance in office. (Part of clause 2, sec. 6, art. 1.)

Each House shall be the judge of the elections, returns, and qualifications of its own members. (Part of sec. 5, art 1.)

Each House may * * * punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. (Subdivision 2, sec. 5, art. 1.)

In voluntary withdrawals from membership in the House of Representatives, the practice has not been uniform. The retiring Member has resigned on the floor of the House. The retiring Member has notified the Speaker in writing and in turn the Speaker of the House

has notified the governor of the State. Then again the retiring Member has resigned to his governor and the governor in turn has notified the Speaker, and then again the House was not informed of the vacancy until the new Member appeared with his credentials, but in all cases the act of the retiring Member has been positive to the extent of showing that he had ceased to be a Member of the House of Representatives as far as he was concerned.

By the statute of the State of Connecticut the governor may accept the resignation of any officer whose successor, in case of a vacancy in office, he has power to nominate or appoint; but there is no statute in the State of Connecticut authorizing the governor of that State to accept the resignation of a Member of Congress.

There is no question but what if a Member of the House of Representatives tenders his resignation, no matter whether it be to the governor of the State or to the Speaker of the House, he becomes *ipso facto* no longer a Member, and therefore it is impossible for a Member having tendered his resignation to withdraw same.

Unless the House of Representatives exercises its power and expels a Member, it rests entirely with the Member as to whether or not he continues his membership. After he has declared in no uncertain terms to the governor of his State or to the Speaker of the House that he has resigned, there is nothing that can be done by the Member or by the officer to whom the resignation was tendered that will tend to continue the membership. The presentation of the resignation is all sufficient. It is self-acting. No formal acceptance is necessary to make it effective. The refusal of a governor to accept a resignation of a Member of Congress can not possibly continue the membership, and certainly it is within the power of the House to declare what effect the presentation of the resignation had upon the membership.

It is extremely important in a case like this for the House of Representatives to know the status of its Members, the duties and power of the House. The person elected owes it to the people in general, and his constituents in particular, to be in his seat discharging his public duties.

The House has a right to know whether the name on the roll is that of a Member, as bearing upon the question of a quorum. The State has a right of representation, denied by nonaction of the House. It is the highest duty of the House to settle the status in a case of this kind.

What question of law does the conceded facts present? It is a universally recognized principle of the common law that the same person should not undertake to perform inconsistent and incompatible duties, and that when a person while occupying one position accepts another incompatible with the first, *ipso facto*, absolutely vacates the first office and his title thereto is terminated without any further act or proceeding. This incompatibility operating to vacate the first office exists where the nature and duties of the second office are such as to render it improper, from considerations of public policy, for one person to retain both. There is an absolute inconsistency in the functions of the two offices, Member of Congress and governor of the State of Connecticut.

While what is here stated is a common-law doctrine, and it is also recognized that there can be no common law except by legislative

adoption, yet it is a principle of law, and the House of Representatives can not well refuse to recognize and adopt it.

As said by the Supreme Court of the United States in *Bucher v. Cheshire Railroad Company* (125 U. S., 555, p. 583):

There is no common law of the United States, and yet the main body of the rights of the people of this country rest upon and are governed by principles derived from the common law of England and established as the laws of the different States.

Assuming that the courts of the United States can not punish for a common-law crime or enforce a common-law right, yet there is nothing to prevent this House from being governed by a common-law doctrine. This feature of the case is very important, because it presents this important question:

Is George L. Lilley a Member of this House? If he is a Member of this House, the power of the House to deal with him is absolutely unlimited; if he is not a Member of this House, then the House has nothing whatever to do with him.

If George L. Lilley is a Member of the House, the House has the constitutional right to compel his attendance in such manner and under such penalties as the House may provide. (Sec. 5, art. 1.)

The House ought not to be placed in an uncertain condition, leaving it to the person to say whether or not according to his interests he shall play fast or loose. If the House needs his presence to help make a quorum and he does not want to attend, he can plead that he is not a Member. If he wants anything as a Member, he can insist that he is not out of Congress, but that he is a Member.

If he is not a Member by reason of resignation or accepting an office that is incompatible, it is not within the power of the chair to recognize him.

There can be but little question but what George L. Lilley resigned his membership in this House and that it became effective on the 5th day of January, 1909, and that being true, it logically follows that he ceased to be a Member at that time; but inasmuch as it seems so clear that George L. Lilley ceased to be a Member of the House of Representatives upon his acceptance of the office of governor of the State of Connecticut, and the question of time is so very brief, that it may be well to hold that his seat was vacant January 6, 1909.

As there is an entire absence of constitutional authority, there is almost an entire absence of precedents.

The committee finds that James S. Robinson, a Representative in the Forty-eighth Congress from the State of Ohio, was elected to the office of secretary of state of the State of Ohio; that Mr. Robinson did tender his resignation as a Member of Congress to the governor of Ohio, and his resignation was placed on file, and thereafter on the same day he was sworn in and duly qualified as secretary of state, and from that time on he did not assume to be a Member of Congress nor attempt to exercise any of the rights or privileges belonging to a Member of this body, but on the contrary resided at the seat of government in the State of Ohio, in the performance of his duties as secretary of state.

The committee simply recommended that the Clerk of the House be instructed to omit his name from the roll of members, because they found that he did not claim to be a Member of Congress. (House of Representatives, Forty-eighth Congress, second session, Report No. 2679.)

In 9 South Carolina Reports, 156, appears the case of the State of South Carolina *v.* Buttz. Buttz was solicitor of the first judicial circuit of the State of South Carolina, and after being commissioned as solicitor he qualified on the 23d of January, 1877, as Representative in Congress from the State of South Carolina.

The Supreme Court held that the offices of state solicitor and Member of Congress are incompatible with each other, and that a solicitor who accepts the office of Representative in Congress thereby vacates his office of solicitor; that where one holding office accepts another which is incompatible therewith, he therefore vacates the first.

The committee is of the opinion that if said George L. Lilley had not resigned on the 5th day of January, 1909, by entering upon the duties of the office of governor of the State of Connecticut, he ceased to be a Member of the House of Representatives of the United States on the 6th day of January, 1909.

The committee therefore recommended as a substitute for the House resolution the following resolution:

Resolved, That the seat in this House of George L. Lilley as a Representative from the State of Connecticut was vacated on the 6th day of January, 1909.

“That the Clerk of this House be, and he is hereby, directed to remove the name of George L. Lilley from the roll of Members of this House.”

SEPARATE VIEWS OF RICHARD WAYNE PARKER AND JOHN A. STERLING.

We agree to the resolution. We think the House has the right to determine whether the resignation should take effect, and that the House should determine that it did take effect.

It is unnecessary therefore to determine whether the office of governor is incompatible with that of Representative, and we reserve any conclusion on that question.

RICHARD WAYNE PARKER.
JOHN A. STERLING.

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